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In The

Supreme Court of the United States

October Term, 1968

No. [redacted] 146

NICHOLAS GALLICCHIO,

Petitioner,

- v -

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Nicholas Gallicchio, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered on March 18, 1968 which judgment affirmed a judgment of conviction and sentence of the Essex County Court entered on July 28, 1966.

Citation to Opinion Below

The opinion of the Supreme Court of New Jersey, printed in Appendix B hereof, is reported at 51 N.J. 313, 240 A.2d 166.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on March 18, 1968. A copy of the judgment and mandate on affirmance is printed in Appendix C hereof. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3) since petitioner's rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States are drawn in question.

Questions Presented

1. Was not the holding of Miranda v. Arizona, 384 U.S. 436 (1966), applicable to petitioner's trial in which the jury was not sworn until June 24, 1966 eleven days after the Miranda decision, although the jury voir dire had begun on June 6, 1966?

2. Did not the receipt in evidence at petitioner's trial of his volunteered, inculpatory statement, made at a time when he had been under arrest for murder for over an hour and had not been advised of his rights pursuant to Miranda v. Arizona, 385 U.S. 436 (1966), violate petitioner's rights under the Fifth Amendment?

3. Were not the petitioner's Sixth and Fourteenth Amendment rights violated by the failure of the trial court to permit cross-examination of a

crucial state's witness concerning his efforts during the trial to intimidate a defense witness by means of physical violence and threats of arrest?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, which are printed in Appendix A hereto.

Statement of the Case

A single count indictment was returned by an Essex County, New Jersey, Grand Jury on November 29, 1965 charging petitioner with murder. Voir dire examination of prospective jurors began on June 6, 1966. Miranda v. Arizona, 384 U.S. 436 (1966) was decided by this Court on June 13, 1966. Eleven days later, on June 24, 1966, a jury was finally selected, sworn, and the taking of testimony commenced on that date.

A probationary patrolman of the Newark Police Department was shot and killed on the morning of October 16, 1965. Petitioner was arrested for the murder by his uncle, a Newark Detective, at 2:30 in the afternoon of the same day. (Vol. XX, 3620, Vol. XVIII, 3306.)[1] Petitioner was taken to headquarters where he was searched and all his personal effects were taken from him. (Vol. XVII, 3295-3298.)

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1 Volume references are to the trial record from the court below, which has been certified and filed with petition as a part of the official record. No appendix was filed in the Supreme Court of New Jersey, inasmuch as petitioner appealed there as an indigent.

From the time of his arrest until approximately 4:00 p.m. petitioner was interrogated by the authorities. He was then forced to appear in a lineup (Vol. XVIII, 3413).[2] On June 29, during petitioner's trial, Lt. Kinney of the homicide squad was asked whether a certain witness made an identification of petitioner in the lineup. The following occurred:

> "Q. Did he make an identification? A. No. But I instructed him if he saw anyone in the lineup he could identify to go over and put his hand on him and point him out and then to state how he was identifying him and why. And before I had told him that and before he had a chance to scan the lineup the defendant said, 'You might as well go pick me out because everyone else will..." (Vol. XVII, 3413).

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2 The record below is void of any testimoney concerning the interrogation of petitioner prior to the lineup. However, in the court below petitioner argued as follows:

> "Furthermore, it is a fact that the defendant was interrogated by the police prior to being placed in the lineup and also thereafter. This fact does not clearly appear in the record, since the state did not explain through testimoney what was done with the defendant for the approximate hour and a half preceding the lineup. However, we doubt that our assertion in this regard will be denied by the state." Brief for Petitioner in the Supreme Court of New Jersey. p. 37.

The state did not challenge petitioner's assertion, and by failing to do so it is submitted that it was in fact tacitly conceded as being true.

Petitioner objected to the foregoing testimony of Lt. Kinney (Vol XXVI, 4622-4623). On appeal petitioner contended that the testimony violated his Fifth Amendment rights as set forth in Miranda, inasmuch as petitioner, after being taken into custody, was not given any warnings as to his rights prior to being interrogated and/or prior to being compelled to appear in a lineup. The New Jersey Supreme Court ruled against petitioner holding that Miranda did not apply since the jury selection had begun on June 6, 1966, and further that petitioner was not undergoing immediate interrogation when the statement was made (Appendix B-10a).

Detective John Biancone of the Newark Police Department testified that around noontime on the day in question he was standing on a street corner near his house in Newark. He heard a car screech around the corner; it was a white Valiant being driven by petitioner whom he had known for a number of years (Vol. XVI, 3004-3009). At this time Biancone said he was standing with two men from the neighborhood known to him only by the nicknames of "Demas" and "Baer" (Vol. XVI, 3014-3015). Biancone discussed this incident with "Demas" and "Baer" (Vol. XVI, 3017). He concluded by stating that he had no idea where the men lived, except he assumed that it was in Newark (Vol. XVI, 3021). The obvious thrust of Biancone's testimony was to place petitioner speeding away from the scene of the murder.

The defense located and produced one Nicholas Salardino and one John Lardieri who were, respectively, "Demas" and "Baer." Salardino testi-

fied that he had known Detective Biancone for 15 years, and had even shared a bachelor apartment with him, and that they were in fact close friends (Vol XXII, 4001, 4003). Salardino in essence testified that Detective Biancone was lying about the aforementioned incident, and stated that it never happened (Vol. XXII, 4003-4008). Lardieri testified that he grew up with Detective Biancone and had known him for 15-20 years (Vol. XXII, 4027-4029). Lardieri in essence testified that Detective Biancone was lying about the aforementioned incident, and stated that it never happened (Vol. XXII, 4029-4033). The witnesses Salardino and Lardieri testified on July 6, 1966.

An in camera hearing the following morning revealed that after court had adjourned for the day on July 6th, the State subpoenaed Lardieri to appear in the Prosecutor's office at 8:30 a.m., July 7th. While this hearing was being conducted, Salardino fled the courthouse, apparently in fear (Vol XXIII, 4209-4224). The court examined Detective Biancone, who admitted to seeking out Salardino the previous evening, taking him for a ride, and hitting him. Biancone admitted to calling headquarters to find outstanding traffic violation warrants against Salardino, if any existed. He also admitted to unsuccessfully trying to locate Lardieri on the same night (Vol XXIII, 4227-4234). The Prosecutor was candid to admit that Biancone had apparently committed perjury the previous day (Vol XXIII, 4168). He also knew that Biancone had gotten to Salardino the previous evening and "gave him a shot in the head" (Vol. XXIII, 4173).

Petitioner moved for leave to recall Detective Biancone for further confrontation and cross-

examination in light of his outrageous conduct by way of the admitted perjured testimony and the events of the evening of July 6th (Vol XXIV, 4238-4331). The prosecutor opposed the motion on the ground that Biancone would now have to invoke the Fifth Amendment to protect himself (Vol. XXIII, 4173). Petitioner's motion was denied by the court, thus foreclosing the jury from evaluating Biancone's credibility in the light of his shameful conduct (Vol XXI, 4516-4531). The New Jersey Supreme Court passed upon this issue on the merits, ruled against petitioner, and held that the trial court properly exercised its discretion, so that the jury would not have become confused or misled (Appendix B, 10a-11a).

Reasons for Granting the Writ

1. On June 6, 1966 the jury voir dire in the instant case was begun. On June 24, 1966 the jury was finally selected and sworn. In between these two dates, on June 13, 1966, this Court's decision in Miranda v. Arizona, 384 U.S. 436, was announced.

In Johnson v. State of New Jersey, 384 U.S. 719, this Court held that Miranda "applies only to cases in which the trial began after" the date of that decision, or June 13, 1966. On petitioner's appeal, which is here sought to be reviewed, the New Jersey Supreme Court held that:

> "Miranda does not apply to this case as voir dire commenced on June 6, 1966, prior to the Miranda decision. Johnson v. New Jersey, 384 U.S. 719, 16 L. Ed. 2d 882 (1966)."

It is urged that this was an erroneous reading of the Johnson decision and should be reviewed by this Court since it presents merely another aspect of the lengths to which the Court below has gone in attempting to avoid the thrust of the Miranda decision. See e.g. State v. Vigiliano, 50 N.J. 51, 66 (1967), holding Miranda not applicable to retrials of cases whose first trial began prior to June 13, 1966.

A reading of Johnson v. New Jersey makes it clear that the heart of the decision to apply Miranda only to "trials begun" after the case was announced is found in the following language:

> "Law enforcement officers and trial courts will have fair notice that statements taken in violation of these standards may not be used against an accused. Prospective application only to trials begun after the standards were announced is particularly appropriate here. Authorities attempting to protect the privilege have not been apprised heretofore to the specific safeguards which are now obligatory. Consequently, they have adopted devices which, although below the constitutional minimum, were not intentional evasions of the requirements of the privilege. In these circumstances, to upset all of the convictions still pending on direct appeal which were obtained in trials preceding Escobedo and Miranda would impose an unjustifiable burden on the administration of justice" 384 U.S. at 732-733.

In this case the police were well apprised of the Miranda safeguards by the time the harmful

testimony was given on June 29, 1966, sixteen days after Miranda. The purposes which Johnson sought to serve by giving Miranda prospective application are not advanced the slightest bit by denying its applicability in the present case. By equating the jury voire dire with the beginning of the trial the Court below flew in the face of established precedent and seized upon this trivial distinction in a purposeful attempt to avoid application of Miranda.

It is profitable to look at those cases deciding when jeopardy attaches for guidance as to the moment when a trial can be said to have begun. It has uniformly and historically been held that jeopardy attaches at the time when the jury has been impaneled and sworn. Alexander v. Fogliani, 375 F.2d 733 (9th Cir. 1967); Howard v. United States, 372 F.2d 294, 297 (9th Cir. 1967); Crawford v. United States, 285 F.2d 661 (D.C. Cir. 1960); Hunter v. Wade, 169 F.2d 973 (10th Cir. 948), aff'd, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974, rehearing denied, 337 U.S. 921, 69 S. Ct. 1152, 93 L. Ed. 1730 (1948). When the trial is to a court without a jury jeopardy "attaches when the court begins the hearing of evidence" Wade v. Hunter, 336 U.S. 684, 687 (Murphy, J., dissenting). See generally, 22 C.J.S. Criminal Law, Section 241. Indeed in a civil case this Court has held that a trial did not commence even after a jury was sworn, but prior to the taking of any testimony Yulee v. Vose, 99 U.S. 539 (1878).

Thus, it is apparent that in any meaningful sense of the word petitioner's trial had not "begun" for purposes of applying Miranda until at least June 24, 1966 when his jury was impaneled and

sworn. The decision below should be reviewed in order that justice be accomplished in this case rather than denied by means of a device designed to circumvent application of the Miranda decision.

2. The statement admitted in evidence against petitioner was made by him while he was in a lineup in police headquarters approximately one hour after he had been arrested for this murder. There can be no question that petitioner was at that time in police custody to a sufficient extent to call for the application of the Miranda v. Arizona, safeguards. It is also undisputed that petitioner received none of the Miranda warnings prior to making the statement. The sole issue in dispute is whether Miranda should apply to bar admission of the statement, notwithstanding the fact that petitioner was not undergoing interrogation at the moment of his statement. It is not disputed that petitioner had been interrogated during the time from his arrest to the lineup in which the statement was made. Under these circumstances it is urged that Miranda should apply.

The decision of the New Jersey Supreme Court below was that Miranda did not apply since petitioner "was not being questioned when he made the statement." This ruling conflicts directly with the only other reported decision which appears to have dealt with this problem. In State v. La Fernier, 37 Wisc. 2d 365, 155 N.W. 2d 93 (Sup. Ct. 1967), the Supreme Court of Wisconsin held inadmissible a "spontaneous statement" made by the defendant in police headquarters while under arrest, and subsequent to having been "interviewed" on the day before making the statement. The

interview merely consisted in asking the defendant if he wished to take a lie detector test. In the instant case the defendant had been interrogated about the crime itself and his statement came within two hours of the questioning. Miranda itself gives force to petitioner's argument herein, when it states that,

> "...the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination" 384 U.S. at 444. (Emphasis added.)

It is clear that any statement made after questioning and prior to the warnings stems from the custodial interrogation. As the court noted in State v. La Fernier, supra, the "psychological coercion inherent in custodial interrogation" does not "only result when the confession immediately follows the interrogation" 155 N.W. 2d at 99.

The beneficient effect of Miranda v. Arizona will be largely nullified unless this Court takes action "in order further to explore some facets of the problems, thus exposed..." Miranda v. Arizona, 384 U.S. at 441. The decision below has removed a large body of statements from the applicability of Miranda, thus cutting down on the effectiveness of that decision. Furthermore, as noted above, two of our states are now in direct conflict over an important aspect of the Miranda rules. For these reasons it is urged that this Court grant this petition in order to resolve the

conflict and to further delineate the Miranda holding.

3. During the course of petitioner's trial it was brought to the attention of the trial court that Detective Biancone, a key witness for the State, had visited one of the defense witnesses, one Salardino, after he had testified, and had threatened the witness with arrest and had actually hit him. On his direct testimony, Biancone had stated that he had been standing with two men whose nicknames were "Demas" and "Baer" but whose last names he did not know, when he made certain observations of the petitioner. The witnesses Salardino and Lardieri testified for the defense that they were "Demas" and "Baer", and knew Detective Biancone quite well and that he knew their last names and where they lived, all contrary to Biancone's testimony. It was in this light that Biancone went to visit Lardieri and Salardino, one evening after their testimony, and actually threatened and struck Salardino. Defense counsel asked to recall Biancone for cross-examination as to these important, impeaching matters, but this request was completely refused by the trial court.

The Supreme Court of New Jersey held that this ruling was within the judge's discretion to "exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will create substantial danger of confusing the issues or of misleading the jury." This ruling conflicts a line of cases in this Court holding that the denial or undue restriction of cross-examination violates a defendant's rights to due process and confirmation.

In Alford v. United States, 282 U.S. 687 (1931), this Court held that cross-examination in a criminal trial is a matter of right and that to prevent its exercise "is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." In that case "the trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination" 282 U.S. at 694. The Court found it to be "the essence of a fair trial that reasonable latitude be given the cross-examiner. ..." The high place occupied in our criminal jurisprudence by the rights of confrontation and cross-examination were again emphasized in Greene v. McElroy, 360 U.S. 474 (1959), where it was noted that,

> "The Court has been zealous to protect these rights from erosion" 360 U.S. at 497.

The Court there cited with approval Professor Wigmore's comments to the effect that "confrontation and cross-examination are basic ingredients in a fair trial" 360 U.S. at 496, n.25.

Most recently this Court dealt with another aspect of this problem in Smith v. Illinois, ___ U.S. ___, 19 L. Ed. 2d 956, 88 S. Ct. ___ (1968). The question presented there was whether the defendant in a state criminal trial had been denied the right to confrontation when he was "denied the right to ask the principal prosecution witness either his name or where he lived, although the witness had admitted that the name he had first given was false" 19 L. Ed. 2d at 959. Noting that Pointer v. Texas, 380 U.S. 400 (1965), had made the Sixth Amendment right to confrontation "obli-

gatory on the States by the Fourteenth Amendment," this Court went on to hold that the partial denial of this right in Smith deprived him of a "right guaranteed to him under the Sixth and Fourteenth Amendments of the Constitution" 19 L. Ed. 2d at 960. The Court harkened back to Alford v. United States for its starting point in making this determination.

In petitioner's trial the court denied him the right to cross-examine a key prosecution witness on a matter that went to the very heart of his credibility, concerning as it did threats against and physical violence to an important defense witness. To have thus denied to petitioner this line of inquiry was to deprive him of a valuable and basic ingredient of a fair trial. In keeping with this Court's rulings from Alford v. United States, supra, to Smith v. Illinois, supra, this petition should be granted to correct this manifest injustice and insure adherence to the previous rulings cited above.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. QUERQUES and
DANIEL E. ISLES
Attorneys for Petitioner

Appendix A Constitutional Provisions Involved

United States Constitution

AMENDMENT V

No person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of council for his defense.

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix B

Opinion of the Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY
A-51 September Term 1967

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

NICHOLAS GALLICCHIO,

Defendant-Appellant.

Argued December 5, 1967. Decided March 18, 1968.

On appeal from the Essex County Court, Law Division.

Mr. Peter N. Perretti, Jr. argued the cause for defendant-appellant.

Mr. John W. Noonan, Assistant Prosecutor of Essex County argued the cause for plaintiff-respondent (Mr. Brendan T. Byrne, Prosecutor of Essex County, attorney; Mr. Richard B. McGlynn, Assistant Prosecutor of Essex County, of counsel and on the brief).

The opinion of the Court was delivered by SCHETTINO, J.

Defendant appeals as of right under former

R.R. 1:2-1(c) from a conviction of second degree murder and a sentence of 25-30 years. Defendant was indicted under the short-form murder indictment charging him with killing a probationary policeman on October 16, 1965.

Defendant contends that there was error at various stages of the trial and that these errors, either singly or cumulatively, were prejudicial. State v. Orecchio, 16 N.J. 125 (1954). He therefore seeks reversal of his conviction and a new trial. His "defense" is alibi, i.e., that he was not at the scene of the shooting at the time it took place.

The facts are as follows. About 12:00 noon on October 16, 1965, the decedent was a passenger in a car driven by a friend, Geramy Spampinato. While driving along Tuxedo Parkway in Newark, they noticed a man standing beside a white Valiant automobile. At the next intersection, while they were stopped, the same white car came up behind them; the driver stopped quickly and the brakes squealed. At a succeeding intersection, the Valiant was still behind them and, at a third intersection, the Valiant bumped Spampinato's car while it was halted for a red light.

The decedent got out of the car and directed the driver of the Valiant to back up. The driver then pulled back to the side of the road. Spampinato turned the corner to find a parking space. Within a minute or two he heard a noise like a shot, ran back to the corner, and saw the Valiant speed off and his friend fall. Spampinato testified that he recognized the car as the Valiant which they had

passed shortly before; the driver was the defendant, the man who had been standing beside it. Other lay witnesses testified that they saw a white Valiant being driven by defendant about that time. Two policemen also testified that they had seen a white Valiant in areas nearby the shooting locale; each separately saw a white Valiant and each identified defendant as the driver.

Subsequent to the shooting, defendant was observed in the Reservoir Tavern; a white Valiant was parked across the street from the tavern. Police searched the tavern premises, and a gun was found in the men's room. (Defendant contends that the first search of the men's room revealed no gun). Later ballistic tests proved this to be the murder weapon.

An uncle of the defendant was a member of the Newark Police Department. In testifying for the State he stated that he had participated in a search of the general area after the shooting. He noticed a white Valiant outside the Reservoir Tavern and saw his nephew, the defendant, inside the tavern. He noted that the description of the slayer generally fitted defendant.

The uncle went to police headquarters and, thereafter, he and another policeman, Detective Paul Whitehead, were directed to pick up defendant. They located him at another bar, arrested him, and drove him to police headquarters. When they arrived in front of the headquarters building, Detective Whitehead noticed defendant throw something out the car window. The uncle got out of the car and picked up the object — a set of car

keys which fitted the Valiant.

As stated above, defendant's case consisted of alibi. Although defendant did not testify, he produced witnesses who testified that he was, at the time of the crime, elsewhere in the City of Newark. Moreover, he contended both that the description of the murderer given by the witnesses did not fit him, and that over-zealous police activity has produced erroneous identifications.

I

Defendant contends that the trial court erred when it denied a pretrial motion to suppress the use of defendant's prior criminal conviction. (He had been convicted and sentenced to a jail term in 1964 on a charge of atrocious assault and battery). He states that the denial of the motion impelled him not to take the stand.

Defendant submits that because this conviction was for a somewhat similar crime of violence it should have been suppressed. The claim is that the use of the prior conviction would have created a capacity for prejudice far outweighing its probative value on the issue of credibility.

We find no error in the trial court's decision. State v. Hawthorne, 49 N.J. 130, 140-42 (1967); State v. Burgess, 97 N.J. Super. 428, 435 (App. Div. 1967).

II

Defendant claims error in the trial court's

refusal, upon motion, to grant a change of venue or a continuance of the trial from June 1966 to the fall term of 1966. His request was based on alleged prejudicial publicity contained in Essex County newspapers at the time of the killing and defendant's arrest. He contends that the publicity was so massive that it violated the standards set forth in State v. Van Duyne, 43 N.J. 369 (1964), certiorari denied, 380 U.S. 987, 14 L. Ed. 2d 279 (1965), and that he was therefore entitled to relief.

We note that defendant's special appendix, containing photo copies of newspaper stories, ends with December 1965, approximately six months before trial. Defendant does not submit any allegedly inflamatory news items for the period of the trial — June and July 1966. In Van Duyne, the publicity complained of appeared at the time of the trial. And in Sheppard v. Maxwell, 384 U.S. 333, 16 L. Ed. 2d 600 (1966), there was "vicious" publicity beginning from the date of the crime and ending after the trial so that a "reasonable likelihood" of prejudice had been shown.

We conclude that as trial was held more than eight months after the crime, there was sufficient time for the passions, if any were aroused, to be dissipated. See State v. Trantino, 45 N.J. 37, 40 (1965), certiorari denied, 382 U.S. 993, 15 L. Ed. 2d 479 (1966).

We find no error as alleged by defendant on this point.

III

Defendant claims prejudice arising from a certain answer given at the trial by defendant's uncle. The uncle testified that when he first saw defendant at the Reservoir Tavern, he searched defendant's person and found nothing; he then searched the tavern and the men's room, where he also found nothing. The prosecutor asked him what he did next, and the detective's answer was:

> "I came out and I waited a while. I thought it best to go down to headquarters to get a gallery picture of the defendant, if any."

Defendant's counsel moved for a mistrial because of the reference to "a gallery picture of the defendant, if any." He contended that these words were prejudicial because they indicated to the jury that defendant had a prior criminal record. The prosecutor stated that he did not know specifically what the detective's testimony would be and admitted that he was surprised by the witness' remarks with reference to the gallery picture.

Defendant's counsel made no objection in the presence of the jury because he felt that to do so would emphasize the inferential point made by him. For the same reason he declined a corrective instruction by the trial court.

The challenged testimony did not indicate any belief that a gallery picture would be available, and thus did not imply that defendant had a prior criminal record. There was, therefore, no error on this point.

IV

Defendant next claims prejudicial error arising out of a police lieutenant's testimony concerning the line-up procedure in this case. The lieutenant testified that three witnesses viewed the line-up. The first was Spampinato, who picked out the defendant. Another witness was called to make the identification, and the police lieutenant stated, in answer to the prosecutor's question as to whether the witness made an identification:

> "No. But I instructed him if he saw anyone in the lineup he could identify to go over and put his hand on him and point him out and then to state how he was identifying him and why. And before I told him that and before he had a chance to scan the lineup the defendant said 'You might as well go pick me out because everyone else will' and he didn't make any identification."

Defendant seeks to apply Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), to this statement. In State v. Vigliano, 50 N.J. 51, 66 (1967), Mr. Justice Francis said:

> " * * * [W]e hold the view that the [United States Supreme] Court's reference to cases commenced and trials begun after June 13, 1966, and to its policy in other cases of application of similar new rules 'in a wholly prospective manner,' signify an intention that the Miranda rule should apply only to cases tried for the first time after June 13, 1966. In context we

take 'commenced' and 'begun' to have the same significance, i.e., to refer to those cases or trials which were initiated or in which the first step was taken after the stated date." (Emphasis supplied).

Miranda does not apply to this case as voir dire commenced on June 6, 1966, prior to the Miranda decision. Johnson v. New Jersey, 384 U.S. 719, 16 L. Ed. 2d 882 (1966).

Moreover, assuming Miranda applies as to date of trial, we find that a statement made under the circumstances here does not fall within the Miranda rule. Defendant had been in custody for an hour, but he was not being questioned when he made the statement. He volunteered it, and it is certainly not the product of interrogation referred to in Miranda. State v. Gosser, 50 N.J. 438, 446 (1967); Ballay v. People, 419 P. 2d 446, 449 (Colo. 1966).

V

Detective Biancone was involved in a physical encounter with a defense witness, Salardino, after both had completed their testimony. The defense sought to recall Biancone for further cross-examination with respect to that encounter. The trial court, in camera, explored the subject fully and concluded that the proposed further examination would lead to the trial of collateral subjects which would obscure the issues in the case. A judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will

create substantial danger of confusing the issues or of misleading the jury. Rule of Evidence No. 4, N.J.S.2A:84A-16. The trial judge was of that view and we see no reason to disagree with him.

VI

Defendant's next point is that the trial court abused its discretion in conducting part of the examination of a witness for the State.

The witness involved was the bartender in the Reservoir Tavern on the day of the shooting. He had given the police a statement at approximately 5:30 P.M. on the day of the murder. In that statement he said that he had seen defendant in the bar between 12:00 noon and 3:00 P.M. and noticed that defendant had used the men's room. At the trial, the bartender was unwilling to say that he had seen defendant go into the men's room; he asserted that he could not remember because he had been busy during the period in question.

A reading of this portion of the record leaves the distinct impression that the bartender was either confused or intentionally evasive about what he had seen on the day of the murder. The trial court, in our opinion, tried with great patience to get the bartender to tell the court and the jury exactly what he remembered. The witness was obviously unhappy at the prospect of testifying. He was either unable or unwilling to understand the directions of counsel and the trial court. We note that what was attempted by counsel and the

court was to get the witness to specify his present or final testimony.

Furthermore, the trial court, with the consent of both attorneys, cautioned the jury that the bartender's prior statement was to have no substantive effect.

We find no error in the trial court's handling of the matter.

VII

Defendant also claims prejudicial error in that the name and address of one of the witnesses was not included in the prosecution's answer to a demand for a bill of particulars. (The defense had sought a list of all persons having information about the crime.)

We find this claim to be baseless. Defendant admits that the prosecutor never had the witness' name. Defense counsel eventually discovered the witness himself, and the witness testified on behalf of defendant.

Defendant submits, however, that the Newark police, who had interviewed the witness, should have passed his name on to the prosecutor so that the prosecutor could have stated it in his answers to the demand for a bill of particulars. Defendant feels that there may have been other people interviewed by the Newark police who would have helped defendant's cause. He concedes that he has no knowledge of such witnesses. We

find defendant's claim to be based on pure speculation and, therefore, no prejudicial error has been shown.

Affirmed.

Appendix C

Judgment of the Supreme Court of New Jersey Sought to be Reviewed

Appeal Docket No. 5446

It is hereupon ordered and adjudged that the judgment of the Essex County Court is affirmed with costs and it is further ordered that the record be remitted to the Essex County Court to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice

Judgment Entered March 18, 1968

Mandate Issued

A True Copy

s/ John H. Gildea
Clerk

Clerk of the Supreme Court

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Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 146

NICHOLAS GALLICCHIO,
Petitioner,

v.

STATE OF NEW JERSEY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

NICHOLAS GALLICHIO,

Petitioner,

v.

STATE OF NEW JERSEY

Respondent.

ON PETITION FOR WRIT OF CERTIORI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

Statement of Questions Involved

1. Is the issue of when the trial started of sufficient importance to the public and substantial enough issue to warrant the grant of *certiorari*?

2. Assuming *arguendo* that *Miranda* does apply, is petitioner's statement in the line-up admissible when it was voluntarily given and was not elicited from him during custodial interrogation?

3. Did the trial judge's decision invoking Rule 4 of New Jersey Rules of Evidence in order to avoid a side issue that would be unduly time consuming violate due process?

REASONS WRIT SHOULD BE DENIED

1. *Certiorari* is granted only in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties themselves. *N.L.R.B.* v. *Pittsburgh S.S. Co.*, 340 U. S. 498 (1951). *Certiorari* is not granted for the benefit of the particular litigants. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70 (1955). The problem here is one of definition *i.e.*, when does a trial begin. If it begins with the *voir dire* then the petitioner's claim would be denied because the *voir dire* was begun on June 6, 1966, which was seven days before the decision of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The warnings in *Miranda* will be applied prospectively and not retroactively. *Davis* v. *State of North Carolina*, 384 U. S. 737 (1966); *Johnson* v. *State of New Jersey*, 384 U. S. 755 (1966). This issue of when a trial commences is not such an issue which would meet the standard in *N.L.R.B.* v. *Pittsburgh, supra.* There is no great public need which would be served in applying a fixed rule to the case at bar. Furthermore the issue, in relation to *Miranda* is episodic and it is very unlikely that this same narrow point will continue to reappear in future cases. Therefore the case *sub judice* would not be of any beneficial importance to the public and would only benefit the petitioner, the particular litigant in the case. Also to grant the petition would

stray from the rule the Federal Courts now seem to follow. See Rule 43, Fed. R. Crim. procedure *infra*.

The time as of which a trial is regarded as having commenced may vary according to the statute being construed. In general, it has been held that a trial begins when the jury are called into the box for examinations as to their qualifications and that the calling of the jury is a part of the trial. *Jordon* v. *Savage*, 88 Ill. App. 2d 251, 232 N. E. 2d 580 (1967); *Wilhite* v. *Agbayani*, 2 Ill. App. 2d 291, 118 N. E. 2d 440 (1954); *State* v. *Canipe*, 240 N. C. 60, 81 S. E. 2d 173 (1954). Although jeopardy does not begin in a criminal case until after the jury have been selected and sworn, for all other purposes the trial begins when the jury are called into the box for their examinations as to their qualifications. *Caples* v. *State*, 3 Okl. Cr. 72, 104 P. 493 (1909). New Jersey, in the case *sub judice* has chosen to treat the *voir dire* as part of the trial. In *State* v. *Vigliano*, 50 N. J. 51, 232 A. 2d 129 (1966), the court said:

> "... [T]he *Miranda* rule should apply only to cases tried for the first time after June 13, 1966. In context we take commenced and begun to have the same significance, i.e., to refer to those cases or trials which *initiated* or in which the first *step* was taken after the started date" (emphasis added).

By "first step" we interpret to mean *voir dire*.

In choosing the *voir dire* as the commencement of a trial or part of the trial New Jersey does not stray from the Federal Court decisions Rule 43, Fed. R. Crim. procedure indicates that the *voir dire* is part of the trial. See 18 U.S.C.A. 308.

> "The dependent shall be present at the arraignment, *at every stage of the trial including the impanelling*

> *of the jury,* and the return of the sentence except as otherwise provided by these rules" (emphasis added).

See also *United States* v. *White,* 237 F. Supp. 644 (D. C. Va. 1964). Since rule 43 indicates the impaneling is part of the trial, it follows that the subsequent *voir dire* is part of the trial. *Contra,* see *Hay* v. *Reed,* 93 Ind. App. 592, 178 N. E. 873 (1931); *Nix* v. *State,* 240 Ind. 392, 166 N. E. 2d 326 (1960), holding that the *voir dire* examination is not part of the trial.

Thus, the State of New Jersey has chosen the rule that the *voir dire* commences the trial. This does not affect the constitutional safeguards of *Miranda.* It is just the rule chosen by the state to carry out the demands of justice. In discussing the procedural rules which developed from the landmark case of *Mapp* v. *Ohio,* 367 U. S. 643 (1961), the court said in *Kerr* v. *State of California,* 374 U. S. 23 at 34 (1963).

> "... the states are not thereby precluded from developing workable rules governing arrests and search and seizure to meet the practical demands of effective criminal investigation and law enforcement in the states, provided that those rules do not violate the constitutional prescription of unreasonable searches and seizures ..."

Applying the same rationale of *Kerr* v. *State of California, supra,* the State of New Jersey contends that it has merely provided for the workable ends of justice in the case at bar. Different States have developed different methods in meeting the new standards which have come down in *Escobedo, Mapp* and *Miranda.* As *Kerr* v. *State of California, supra* points, as long as the workable rules

do not violate the constitutional safeguards they will be acceptable. The choice of rules, when proper, cannot be said to raise a constitutional issue when a particular litigant disagrees with the specific rule chosen. That is what happened here. The petitioner, in order to meet his own need, would say that New Jersey erred in considering the *voir dire* as the beginning or part of the actual trial. The petitioner's argument is entirely without weight. New Jersey has formed a rule within the constitutional limits, and though regretfully excluding the petitioner, the rule is still a valid constitutional decision. There is no principle which is of importance to the public and since the question will not continue to plague the courts, there is no necessity for granting the writ of *certiorari*. Therefore, petitioner's request should be denied.

2. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *Miranda* v. *State of Arizona*, 384 U. S. 436 at 444. Custodial Interrogation means questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom by action in any significant way. *Miranda, supra* at 444. Here the defendant had been in custody for an hour, but he was not being questioned when he made the statement:

> "You might as well go pick me out because everyone else will."

Defendant volunteered this statement. He was not being questioned and it cannot be said that the statement was the product of in-custody or custodial interrogation. The *Miranda* decision recognizes at least two exceptions to its

exclusionary rule; general on the scene questioning as to facts surrounding a crime and statements freely volunteered without compelling influence. *State* v. *Gosser,* 50 N. J. 438, 236 A. 2d 874.

> "In dealing with statements we do not purport to find all confessions inadmissible . . . [A]ny statement given freely and voluntarily without any compelling influence is of course admissible in evidence . . . [V]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

Cf. United States v. *Repetti,* 364 F. 2d 54 (2nd Cir. 1966) holding:

> "Statement by the defendant in a narcotics prosecution, made immediately after he was arrested was not erroneously admitted where it was volunteered and not elicited by interrogation and was finally stricken as irrelevant."

Cf. also *Diaz* v. *United States,* 264 F. Supp. 937 (D. C. La. 1967).

Thus, it is apparent that petitioner's statement is clearly admissible. He was not being questioned by the police. He was being subjected to a regular police procedure. The lineup is regularly used for the detection of crime as are other police devices such as fingerprinting.* There was

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* Although it is recognized that a defendant is now entitled to counsel at a line-up. *Gilbert* v. *State of California,* 388 U. S. 263; *United States* v. *Wade,* 388 U. S. 218 (1967), the rule of those cases is not applicable to the case at bar. *Stovall* v. *Denno,* 388 U. S. 293 (1967).

no undue influence or coercion upon the defendant when he blurted out the incriminating statement. Therefore, even applying the rule of *Miranda* to the case at bar, the statement by the petitioner is still admissible because it was voluntarily given without the use of interrogation or coercion.

The petitioner would have the court rely on *State* v. *La Fernier,* 37 Wis. 2d 365, 155 N. W. 2d 93 (1967). However, that case is easily distinguished from the case *sub judice.* In *La Fernier,* the defendant had been arrested on June 30, 1966, at 3:30 P.M. and was incarcerated continuously until 9:30 A.M. the following day. He was taken into a room where he agreed to take a polygraph examination. Upon entering the room the defendant made a voluntary statement. The court ruled the statement inadmissible as the defendant had not been apprised of his rights under *Miranda* until after he made the statement Certainly petitioner cannot contend that the circumtsances were the same in the case before the court now and that of *State* v. *La Fernier.* A line-up contains no coercion or fear, and is an ordinary procedure. But a lie detector test is far from ordinary and could easily insert fear or coercion into the mind of a person who had been in jail for 18 hours.

Therefore, *State* v. *La Fernier, supra* can add no support to petitioner's position. For the reasons stated even if *Miranda* were to apply to this case, the petitioner's statement would still be admissible. Therefore *certiorari* should be denied petitioner.

3. It appears that a good portion of the last five days of the trial of the within matter was devoted to a collateral issue which arose concerning the testimony of two defense witnesses, Nicholas Salardino and John Lardieri. Salardino will be hereafter referred to as "Demas" and Lardieri as "Baer."

Detective John Biancone testified on behalf of the State to the effect that, on that date of the killing he observed the defendant fleeing the area of the crime in the car which was otherwise identified as the vehicle used by the defendant. The Detective testified that he made this observation while standing on a street corner with two men known to him only as Demas and Baer. This was brought out on cross-examination.

Subsequently, both Demas and Baer testified as defense witnesses and both indicated in substance that they had not seen the Detective nor had they been standing with him at the time Biancone's observation was made. The essence of the testimony of Biancone, Demas and Baer as told here by the jury was as just stated herein. What follows is a discussion of subsequent developments, none of which were communicated to the jury.

Following the testimony of Demas and Baer, and on the same evening that they finished testifying, Biancone attempted to contact both men. He succeeded in contacting Salardino and apparently took him for a ride during the course of which he struck Salardino. When the Court was apprised of this, and of the request of both counsel an *in camera* hearing was held, at which time both Baer and Biancone testified. Baer testified in substance that Biancone had tried to reach him and failed. He further testified that Demas called him and told him that Biancone had threatened him and had beat him up.

Biancone testified in substance that he realized the impropriety of his having gone to speak to Demas but that he did so to find out why Demas had lied. He stated that Demas had gone to him during the previous week at police headquarters after he, Biancone, had testified and mentioned the names of Demas and Baer. Demas had told Bi-

ancone that he had been approached by the defendant's father and was under some pressure to testify contrary to the truth. Biancone consulted Demas to tell only the truth when he was called at the trial. Biancone had thus gone to see Demas after the latter testified to determine why Demas and Baer had not told the truth.

The attorney for the defendant requested the opportunity to recall Biancone and examine him only as to his having attempted to contact the two men and his having used threats, abuse and violence on Demas. The State took the position that if this was done, it would have the right to bring out the motive for Biancone's behavior as he did, including the statement of Demas that the defendant's father had become involved in attempting to influence testimony. When the trial court indicated that it felt the whole story should be brought out, if any of it was to be brought out, the defense indicated some doubt as to whether to recall Biancone. Finally, apparently treating the matter as an application for the re-opening of cross-examination of Biancone, the trial court ruled that the exploration of all of these matters would open up collateral issues not relevant to the main issues before the jury. The trial court's ruling, to the extent it was a ruling, was based upon the possible prejudice, which would inure to the defendant if it was brought out that his father attempted to influence a witness.

It is submitted that the trial court correctly ruled. While the attempt by one witness to influence the testimony of another is indeed reprehensible, it is submitted that the attempt which took place here was not one which, by its very nature, should have been made known to the jury. Demas and Baer had already testified at the time Biancone reached out for them. Their testimony, which clearly contradicted that of Biancone, was before the jury and

thus not subject to tampering by anyone. The conflict in the testimony of Biancone and the two defense witnesses was properly left for the jury to resolve.

Moreover, the trial court's indication that, if the matter was re-opened, the full story should be told to he jury was, it is submitted, a proper ruling. If there, in fact, was a motive for Biancone's behavior, that motive should have been presented to the jury. However, the trial court saw the revealing of the full story as being the opening of collateral issues unrelated to the guilt or innocence of the defendant. While the issue of credibility should not unduly be restricted at trial, there does exist discretion in the trial court to limit examination thereon, when to allow it to continue would mean the creation of another trial within a trial. A judge may in his discretion exclude evidence if he finds that its probative value is substantially outweighed by the risk that its admission will create substantial danger of confusing the issues or misleading the jury. *Rule of Evidence* No. 4, N.J.S. 2A:84A-16. Furthermore, the order of receiving evidence, recalling of witnesses for further cross-examination, and acceptance or rejection of rebuttal testimony are matters within the trial court's broad discretion, exercise of which will not be disturbed on appeal, in the absence of a clear showing of abuse. *Johnson* v. *United States*, 207 F. 2d 314 (5th Cir. 1953), *cert.* denied 347 U. S. 938; *Delanger* v. *Alton Box Bd. Co.*, 180 F. 2d 87 (7th Cir. 1950). The trial court saw the recalling of the witness as being the opening of collateral issues unrelated to the guilt or innocence of the defendant. There was no error on the trial court's decision. Therefore, defendant's petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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